IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 31.

MCLEAN TRUCKING COMPANY, INC., THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND AMERICAN FARM BUREAU FEDERATION, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ASSOCIATED TRANSPORT, INC., BARNWELL BROTHERS, INC., ET AL., *Appellees*.

Appeal From the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT McLEAN TRUCKING COMPANY, INC.

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OPINION BELOW.

JURISDICTION.

QUESTIONS PRESENTED.

STATUTES INVOLVED.

STATEMENT OF THE CASE.

McLean Trucking Company, Inc., one of the appellants herein, adopts the statements contained in the Brief of the Secretary of Agriculture relative to the above topics.

SUMMARY OF ARGUMENT.

McLean Trucking Company, Inc., is an independent motor carrier operating in competition with some of the principal carriers, parties to the proposed merger. The McLean Trucking Company, Inc., instituted the suit below because of the material effect the proposed merger would have upon its business as an independent motor truck operator. In the case below the Secretary of Agriculture and the American Farm Bureau Federation intervened as parties plaintiff, and the United States of America confessed error. In the appeal now before this court, the interests of the McLean Trucking Company, Inc., are likewise identified with the position taken by the Secretary of Agriculture and the American Farm Bureau Federation. Therefore, the McLean Trucking Company, Inc., adopts the brief of the Secretary of Agriculture as also expressing its views on the vital issues before this Court.

The McLean Trucking Company, Inc., desires, however, to emphasize the effect of the proposed merger of powerful, competing motor carriers upon the independent motor truck carriers operating in the same territory.

ARGUMENT.

Differences in the policy of Congress respecting rail carriers and motor carriers are apparent from a study of the legislative history of regulation of rail carriers and of motor carriers. Not only is the regulation of motor carriers a new departure, introduced in 1935, nearly fifty years after the regulation of railroads had begun, but it is apparent that Congress contemplated less rigid regulation of motor carriers than of rail carriers.

A motor carrier franchise does not involve the same elements of compulsion as a railroad franchise. Railroad rights-of-way, being regarded as devoted to the public interest, cannot be abandoned without permission of the Interstate Commerce Commission. (Interstate Commerce Act,

Section 1 (18)), whereas a motor carrier can abandon any part or all of its routes at any time that it sees fit.

In the case of rail carriers the Interstate Commerce Act makes it mandatory that they establish through routes with other rail carriers and provide just and reasonable rates, fares, charges and classifications applicable thereto, and establish just, reasonable and equitable divisions thereof which shall not unduly prefer or prejudice any of the participating carriers (Sections 1 (4), 15 (1), (3)); whereas, in the case of common carriers of property by motor vehicle the statute does not make it mandatory but only permissive to establish through routes and rates. (Section 216 (c).)

If through routes and joint rates are established by motor carriers, the Commission has power to regulate them and prescribe equitable divisions, but it has no power to initiate the creation of joint rates or to prevent their cancellation. The testimony in the record with respect to interchange of traffic (in spite of the inadequacies of the testimony) shows the importance to the operations, and even the existence, of small independent carriers, of through routes and equitable divisions of joint rates.

Under the Motor Carrier Act the Commission is not even permitted to forbid rate practices which discriminate against other carriers, but only to forbid discriminations against shippers. This result follows from Section 216 (d) of the Interstate Commerce Act (49 U. S. C., Sec. 316 (d)). Motor carriers can refuse to establish through routes and joint rates with other motor carriers, and can even discriminate against other motor carriers in their rate schedules. The Commission, therefore, must give more consideration to factors of competition than in the case of railroad mergers. Nevertheless, there is no indication in the Commission's report that it made any differentiation between the two types of carriers.

The Motor Carriers, Parties to the Merger, Were Selected Because of the Strong Position Which They Occupied in the Motor Carrier Field Along the Atlantic Seaboard.

The motor carriers involved in the proposed merger were selected by the Chairman of the Board, and President of Associated Transport, Inc., for inclusion in the merger because of their strong position in the industry. This is not a merger of small lines to form one that can compete on an even basis with existing lines. It is a merger of the largest existing lines in order to form a veritable behemoth in the trucking field. Mr. Horton frankly testified that the parties to the merger were chosen because of their strength (R. 513), and that he expected Associated Transport to make employment contracts with the key men in the various merging companies so that they might not be in a position to take part in competitive operations (R. 522-523-544).

The exhibits which the applicant prepared and offered did not show the volume of freight carried by any of the alleged competing lines between points served by the combine (R. 637-1052), and did not give any indication of the number of vehicles operated by them, or the proportion of their operations which were in other sections of the country than those served by the combine (R. 1153). When an exhibit was introduced purporting to show the revenues of carriers operating between various points, it showed not the revenue of each carrier from traffic between those points, but the revenue for the total operation of the companies (R. 1191-1192), even though a large part of those operations might be in areas outside that involved in the proposed unification (R. 1192).

The companies, parties to the merger, are dominant in their separate territories. For instance, the combined revenues of McCarthy and Consolidated are three times greater than any single company that will be left in the area, and equal to that of the five largest remaining companies combined (R. 1302).

The effects which the combine's power would have, and the way in which it would be used, were not left to inference. Offers of proof on the subject were made and rejected by the Commission. Because of the absence of any evidence respecting the actual volume of business of other carriers between points in the area affected by the unification, the Antitrust Division of the Department of Justice requested the Commission, before the close of the hearings, to require that the lines which are parties to the merger and certain other lines furnish information concerning the tonnage interchanged with each connecting line in New York and other major interchange points during a representative period (R. 1356-1367). In spite of definite testimony that the tendency of the merger would be to deprive independent carriers of a substantial portion of such interchanged traffic (R. 1203-1253), the Commission refused to grant the motion (R. 35).

One of the major reasons advanced in support of the merger is that after the merger has been accomplished, shippers and receivers of freight, located in the vast industrial area covered by the combined operations of the parties to the merger, will be offered a service which, if accepted, will eliminate the necessity of the need to patronize any other carrier (R. 524-534). The shippers and receivers of freight will be told that it is no longer necessary for their shipments to be delayed due to the necessity of interchange. No longer will these shippers and receivers of freight need to have trucks from various motor carrier companies calling at their facilities for traffic. Associated Transport, Inc., will serve directly all points which are located on the lines of the parties to the merger throughout the vast area up and down the Atlantic Seaboard. Interchange of traffic will not be tolerated except only to the extent necessary to serve points not located on its regular routes.

Now what does this mean to independent motor carriers who, at the present time, render a direct service between points on their lines, as well as an interchange service to and from points not located on their lines in conjunction with either the motor carriers, parties to this merger, or with independent motor carriers of the type of the McLean Trucking Company, Inc.? Stated in plain language it means that these independent motor carriers, such as Appellant, will be relegated solely to the performance of single-line service between points situated on their lines, and will be deprived of the interchange traffic which now contributes a great proportion of their total revenue.

The Commission did not make a basic finding of fact that inadequate service by motor carriers exists in the area adjacent to the Atlantic Seaboard. Therefore, the Commission's authorization of the merger cannot rest on the ground that the merger is necessary if members of the shipping public are to be provided with adequate transportation service by motor vehicle. Its order rests on the theory that an improved service is promised and that economy might be forthcoming which ultimately might be reflected in the level of rates assessed for transportation service. The record is clear that elimination of interchange is the key to the promised improved service which the proponents of Associated Transport, Inc. promises to render.

The Interstate Commerce Commission Does Not Have Power to Force Associated Transport, Inc., to Establish Through Routes and Joint Rates.

Section 216(c) of the Interstate Commerce Act (49 U. S. C. Sec. 316(c)) does not make it mandatory that common carriers of property by motor vehicle establish through routes and joint rates with other common carriers. If through routes and joint rates are established by motor carriers, the Commission has power to regulate them, and prescribe equitable divisions thereof, but it has no power

to force the creation of through routes or to initiate the creation of joint rates, or to prevent their cancellation.

Parties to the proposed merger, at their whim or fancy, could cancel all through-route arrangements and joint rates now in effect in connection with all independent motor carriers rendering service to and from points serviced by parties to the merger and the Commission would be powerless to do anything about it, or to interfere, even though such cancellation was detrimental to the public interest and had the effect of constituting an absolute monopoly of transportation service by motor vehicle.

Under the Motor Carrier Act the Commission is not even permitted to forbid rate practices which discriminate against other carriers; it can only forbid discriminations against shippers. This result follows from Section 216(d) of the Interstate Commerce Act (49 U. S. C. Sec. 316(d)). Under the Act, therefore, parties to the merger could choose and select the independent motor carriers upon whom they desire to cast their blessings. By such a practice independent motor carriers could be quickly driven to the wall and destroyed.

The Commission Erred in Refusing to Reopen the Proceeding to Permit Introduction of Evidence That the Purpose and Effect of the Merger was the Destruction of Independent Motor Carriers.

The McLean Trucking Company, Inc. has no illusions about the results which will flow from this merger, if it is approved and once in the clear. We have seen that independent truckers cannot look to the Commission for succor —that guardian is powerless to aid. The apprehension of the McLean Trucking Company, Inc. is justified in the light of the Commission's denial of the petition filed by the Anti-trust Division of the Department of Justice requesting that the case be reopened in order to permit the introduction of evidence having a material bearing on the effect of

the proposed merger on independent motor carriers (R. 475 ff). The evidence which the Division sought to introduce was calculated to show "that the purpose and inevitable result of the proposed merger will be to restrict and restrain, through various means and devices, the ability of various independent motor lines to function competitively to the merged lines, thereby assuring to Associated Transport, Inc. monopolistic control of the carriage of freight by motor vehicle along the Atlantic Seaboard" (R. 479).

Another subject of the proposed testimony was that the parties to the merger had carried on a systematic plan of oppressive opposition to small independent motor carriers' applications before the Interstate Commerce Commission requesting certificates of convenience and necessity; and that the financial strength of the merged company would increase its power to obstruct applications of independent motor carriers by every procedural means at its disposal, and eliminate competition by making it beyond the financial means of small carriers to enforce their rights (R. 480).

In denying this offer of proof the Commission concluded that the proffered testimony would have no bearing on the issue as to whether the proposed merger would be "consistent with the public interest".

According to eminent legal historians the earliest conspiracies known to the law were those where the object of the conspirators was to abuse legal procedure. P. H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge Studies in English Legal History, Cambridge University Press, 1921) pp. 2, 109, 111. Oppressive opposition to independent motor carriers' applications for certificates of convenience and necessity by a financially strong competitor would make it beyond the financial means of small carriers to enforce their rights.

If the Commission was required to give any consideration to the preservation of competition, evidence of a purpose to stifle competition was clearly of vital importance.

The Commission is a public agency created by the Congress to administer an act which provides that:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy." (The declaration of policy in the Transportation Act of 1940 (49 U. S. C. Sec. 1).)

We think that it is self-evident from the above-stated declaration of policy that it was the duty of the Interstate Commerce Commission to go to the bottom of the matter and ascertain the effect of the proposed merger upon adequate service to the public, and upon the independent truckers to whom the public is required to look for service unless the merger is to be permitted to monopolize the field of transportation by motor carriers.

CONCLUSION.

It is respectfully submitted that the decree below should be reversed with directions to issue an injunction as prayed for in the petition.

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Dated at: Washington, D. C.,
919 Investment Building.

October, 1943.